

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
DEPUTY SECRETARY

In the Matter of)	
)	
Amendment of Parts 21 and 74 of)	
the Commission's Rules with Regard)	MM Docket No. 94-131
to Filing Procedures in the)	
Multipoint Distribution Services and)	
in the Instructional Television)	
Fixed Service)	DOCKET FILE COPY ORIGINAL
)	
and)	
)	
Implementation of Section 309(j) of)	PP Docket No. 93-253
the Communications Act)	
Competitive Bidding)	
_____)	

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION AND CLARIFICATION

Pursuant to Section 1.429 of the Commission's Rules, Trans Video Communications, Inc. (TVC), by its undersigned attorneys, hereby petitions for partial reconsideration and clarification of the rules and policies adopted in the above-referenced dockets on June 30, 1995.¹ See Report and Order, FCC 95-230 (released June 30, 1995). TVC is a wholly-owned subsidiary corporation of the Roman Catholic Diocese of Brooklyn. Either TVC or the Diocese has been authorized to provide Instructional Television Fixed Service in the Boroughs of Brooklyn and Queens for nearly 30 years. During this time, TVC has been

¹ Notice of the Report and Order was published in the Federal Register on July 17, 1995. See 60 Fed. Reg. 36523 (July 17, 1995). Hence, this petition is timely pursuant to Section 1.429(d).

transmitting instructional programming to over 200 schools within the Diocese and has operated its ITFS stations to make substantial contributions to the educational and cultural life of its authorized service areas. TVC recently entered into an excess capacity lease agreement with CAI Wireless Systems, Inc., and so has a substantial interest in the rules and policies adopted in the Report & Order.

I. THE RULE GIVING A RIGHT OF FIRST REFUSAL TO BTA LICENSEES FOR NEW ITFS LEASES MUST BE ELIMINATED.

In the Report & Order, the Commission adopted a rule which includes among the "rights" of BTA authorization holders a right of first refusal for new leases for use of excess capacity on ITFS stations located within the BTA. Report & Order, ¶ 41. This policy must be eliminated for two reasons. First, the Commission did not provide adequate notice that it was considering adoption of this rule; therefore, the rule is procedurally flawed and must be rescinded. Second, even if adopted, the intrusiveness of this rule into the contracting process is likely to impair rather than promote the development of wireless cable service within the BTA. Therefore, the rule is contrary to the public interest.

Violation of APA. The Commission did not provide adequate notice and opportunity for comment on this issue in order for adoption of the rule to satisfy the Administrative Procedure Act. 5 U.S.C. § 553(b)(3). It is a basic requirement of administrative rulemaking that substantive changes in agency policies and rules may be adopted only after sufficient public notice which allows comment on

the specific proposed rules. See Reeder v. Federal Communications Comm'n, 865 F.2d 1298, 1304-05 (D.C. Cir. 1989).

In the Notice of Proposed Rule Making in this docket, 9 FCC Rcd 7665 (1994), the Commission gave no notice at all that it was proposing to grant any form of lease rights for ITFS frequencies to the licensee of MMDS stations. As a result, the Commission has received no comments on the right-of-first-refusal proposal from interested parties, and could not have adopted the rule pursuant to the reasoned decisionmaking requirements of the APA. Without notice and opportunity for comment, the rule including the right of first refusal among the rights authorized to the BTA licensee is invalid and must be rescinded.

Impairment of Contract Process. The right of first refusal is an unwarranted intrusion in the process of negotiating an excess capacity lease agreement. By adopting this rule, the Commission has implicitly assumed that the identity of the lessee does not matter to the ITFS lessor as long as the lessor obtains the terms it wants. This assumption is incorrect. In many cases, the ITFS licensee's decision to lease at all depends entirely upon the identity of the potential lessee. In these cases, awarding a right of first refusal to the BTA authorization holder could result in no lease of the channels. Such a result is inconsistent with the Commission's goals of promoting the maximum use of all ITFS and MMDS frequencies and providing ITFS lessors with a source of revenue for their instructional activities. See MMDS Allocation Order, 94 FCC 2d 1203, 1249-50 (1983).

Moreover, the Commission may have unintentionally preempted certain state and local regulations governing the award of service contracts. As the Commission is aware, many public and governmental entities, which are also ITFS eligible, have strict guidelines for award of service contracts. Some of these regulations require that these entities must seek bids on contracts and provide stringent guidelines for negotiation and execution of a contract. Were the Commission's policy to remain in effect, the BTA licensee would not be required to submit a bid, and the ITFS licensee may be precluded from following its own regulations regarding award of contracts. The Commission should not intercede in such contracting procedures.

In addition to interference with the process of negotiating an ITFS lease, the right of first refusal provides an opportunity for the BTA licensee to impair the ability of another wireless cable operator to compete within the BTA. For example, in many communities, an ITFS licensee may have the opportunity to negotiate a lease with an existing wireless cable operator (not the BTA licensee) using a transmitter site where several incumbent MMDS stations are colocated and which the BTA licensee must protect from interference for a distance of 35 miles from the transmitter. The BTA licensee's exercise of the right of first refusal would make it impossible for the incumbent system to gain access to those additional ITFS channels through the new lease and thereby enhance channel capacity on its system and its ability to compete with other cable systems in the market. However, in this scenario, the BTA holder may not even be able to use

the four ITFS frequencies at the colocated site because of the difficulty in integrating the signal into its distribution system in the areas of the BTA which are 35 miles from the incumbent MMDS stations' transmitter site. The BTA authorization holder's inability to use the channels may have the effect of denying the ITFS operator a revenue stream, particularly if royalties are tied to the number of subscribers who receive programming on the leased channels. Thus, contrary to the public interest, in such circumstances, the incumbent wireless cable operator would be denied use of the excess capacity, and the ITFS operator would be denied revenues for use of its channels.

II. THE INTERFERENCE PROTECTION RULES FOR LEASED ITFS AND INCUMBENT MMDS STATIONS SHOULD BE MADE CONSISTENT.

In order to preserve the value of ITFS leased operations to wireless cable operators, the Commission should modify the rules adopted regarding the interference protection to be afforded by BTA licensees to the protected service areas for leased ITFS and existing MMDS stations. In the Report & Order, the Commission states that "whenever BTA authorization holders in adjacent BTAs both lease the same ITFS channel group, such that the 35-mile protected circle of each extends into the BTA of the other," the BTA licensees "will not be required to protect that portion of the 35-mile circle associated with the other authorization holder that falls on his or her side of the boundary" absent an interference agreement. Report & Order, ¶ 41. Yet, there is no similar rule for incumbent

MMDS stations, which must be protected at all points within a 35-mile circular area centered at the station's transmitter site. See Second Order on Reconsideration, FCC 95-231 (released June 21, 1995). Indeed, when leasing airtime on MMDS stations, the BTA licensee obtains a protected service area which extends to the BTA boundary or the 35-mile protected circle whichever is larger. Report & Order, ¶ 45. Thus, it appears possible that, if the BTA licensee is leasing airtime on MMDS stations colocated with ITFS stations with the BTA overlap, the MMDS stations would be protected for the full 35-mile circle into the adjacent BTA, but the ITFS stations would not. Yet, the adjacent BTA authorization holder must protect the existing ITFS receive sites within its BTA.

Of concern to ITFS lessors like TVC is that this difference in protection may have an adverse effect on the value of ITFS leases. The wireless cable lessee of colocated MMDS and ITFS stations in such circumstances would probably have to reduce the service area for all stations in the system because the useable service area would be the smallest protected service area reached by all signals. Reduction in service area would likely result in decreasing the value of leased operations on ITFS stations by reducing the number of potential subscribers. As the Commission is aware, ITFS leases frequently include a formula to calculate royalties based on the number of subscribers to the wireless cable system.

Accordingly, the Commission should modify its rules to require BTA licensees to provide interference protection for the 35-mile circular area of existing MMDS stations and leased operations on ITFS stations. In this way, the

Commission can ensure that the protected service area available to existing ITFS stations for lease operations is not diminished and therefore the value of the leased operations to the ITFS lessor and lessee is not reduced.

III. RECEIVE SITES OF ITFS STATIONS USING OLDER EQUIPMENT
MUST BE PROTECTED FROM INTERFERENCE AT A MORE
STRINGENT SIGNAL STRENGTH RATIO OR MUST BE UPGRADED.

Section 21.902(f)(2) of the Commission's Rules requires MMDS operators to provide interference protection for adjacent-channel ITFS receive sites constructed before May 26, 1983, at a desired-to-undesired signal strength ratio of 10 dB or greater, unless the MMDS operator agrees to upgrade the receive site equipment, in which case the 0 dB standard applies. 47 C.F.R. § 21.902(f)(2); see Second Report & Order, 58 RR 2d 559, 590-92 (1985), modified on recon., 59 RR 2d 1355, 1384 (1986).

Although the Commission modified the second sentence of Section 21.902(f)(2) regarding the 0 dB standard in the Report & Order, it did not modify similar language in the third sentence outlining the 10 dB standard for older receive site equipment. As a licensee of long-standing on the F-Channel Group, TVC requests that the Commission clarify that the 10 dB interference protection standard remains in effect for older adjacent-channel ITFS receive sites. The rationale for protecting older ITFS equipment is unchanged. See Second Report & Order, 58 RR 2d at 591 (affording additional adjacent-channel protection for older equipment to "insur[e] continued service from equipment which may not have been

designed to operate in the presence of adjacent channel signals"). Accordingly, the standard should remain the same as well.

IV. CONCLUSION

For the reasons outlined above, TVC requests that the Commission grant reconsideration of the Report & Order and modify and/or clarify the rules adopted therein as follows:

1. The right of first refusal for new ITFS leases must be eliminated from the "rights" associated with a BTA authorization.
2. The interference protection rules must be modified to require BTA licensees to provide equivalent interference protection for the 35-mile circular protected service area of incumbent MMDS stations and ITFS stations during leased airtime.
3. The Commission should reaffirm that ITFS receive sites constructed before May 26, 1983, must be protected from adjacent channel interference at the desired-to-undesired signal strength ratio of 10 dB or greater, unless upgraded equipment is provided by the MMDS licensee.

Respectfully submitted,

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